BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion of the Massachusetts Supreme Judicial Court (R. p. 37) is reported in 28 N.E. (2d) 433, and may also be found in Massachusetts Adv. Sh. (1940) at page 1229.

Jurisdiction.

The jurisdiction of this court is invoked under section 237 (b) of the Judicial Code as amended by the Acts of February 13, 1925, 43 Stat. 937, 28 U.S.C. sec. 344 (b). The final order or the judgment of the Supreme Judicial Court, which is the highest court of the Commonwealth of Massachusetts in which a decision could be had, was entered September 16, 1940 (R. p. 44).

Question Presented, Statutes Involved, Specification of Errors and Statement of the Case.

A statement of questions presented, the statutes involved, the specification of errors and a statement of the case will be found in the foregoing petition.

Argument.

The decision of the Massachusetts Supreme Judicial Court rested solely on the ground that the taxing statute here involved, which exempted the recipient of dividends of Massachusetts cooperative banks from taxation on the income so received, was discriminatory and hence unconstitutional in that it did not extend a like exemption to the recipient of dividends from federal savings and loan associations. It is admitted that a taxing statute cannot constitutionally discriminate arbitrarily and capriciously

against persons where there is no reasonable distinction nor rational basis for difference in treatment, *Bell's Gap R.R. Co.* v. *Pennsylvania,* 134 U.S. 232; *Home Insurance Co.* v. *New York,* 134 U.S. 594; *Giozza* v. *Tiernan,* 148 U.S. 657; but it is submitted that in the instant case there was no arbitrary and capricious attempt to reach one group of taxpayers and free another. When exemption was first granted to shareholders in Massachusetts cooperative banks no shareholders in federal savings and loan associations existed, for there were no such associations. The court below apparently did not question the right of the legislature to grant the exemption originally. It is quite likely that the legislature may have desired to encourage thrift among its inhabitants and took this means accordingly to promote the investment of money by its inhabitants in certain banks under its own control and supervision where it could assure to those inhabitants a high degree of safety in making the investment.

The court below, however, appears to take the ground that when thereafter federal savings and loan associations came into being it was discriminatory upon the part of the legislature not to extend similar exemptions to those inhabitants of the Commonwealth who might then come to possess shares in the new federal associations and to receive income therefrom. But although the Appellate Tax Board found that these associations did a business of a similar nature to that done by Massachusetts cooperative banks and in competition therewith, there were obvious differences. The Board found that "in accordance with the provisions of Section 5(k) of the Home Owners' Loan Act of 1933, the association has been designated by the Secretary of the Treasury as a fiscal agent of the Government of the United States for the purpose of collecting delinquent accounts arising out of insurance and loan transactions under Title I of the National Housing Act of June 27, 1934, as amended,

and also for making investigations and rendering reports respecting said delinquencies, as may be directed from time to time by the Administrator under said Act, and also for the purpose of taking applications from its members and forwarding remittances, or making delivery of United States savings bonds. It is a member bank of the Federal Home Loan Bank of Boston" (R. p. 21). Clearly Massachusetts cooperative banks did not and could not perform these functions nor act in these capacities. Moreover, the federal associations were incorporated under federal law and were in no way subject to the supervision and control of the Commonwealth of Massachusetts. The policy to be pursued by these associations, the risks which they would take and the checks which would be imposed upon them with a view to the protection of their shareholders were entirely beyond the power of the Commonwealth to shape or control. Moreover, the Federal Revenue Act, which imposes not only surtaxes but also the normal tax upon the receipt of dividends from Massachusetts cooperative banks, exempts from the normal tax the receipt of dividends from federal savings and loan associations. Lest an unfair advantage be extended to investors in federal savings and loan associations as against investors in Massachusetts cooperative banks, the legislature may quite reasonably have desired to preserve its exemption from state taxation for investors in Massachusetts cooperative banks without extending it to investors in federal savings and loan associations, to the end that tax advantages, both federal and state, might be more evenly and equitably distributed among its citizens.

The states under the Fourteenth Amendment and the federal government under the Fifth Amendment may exercise a very broad discretionary authority in the classification of the subject-matter taxed. *Royster Guano Co.* v. *Virginia,* 253 U.S. 412; *Louisville Gas Co.* v. *Coleman,* 277 U.S. 32; *Utah Power and Light Co.* v. *Pfost,* 286 U.S. 165; *Welch*

v. *Henry,* 305 U.S. 134; *Helvering* v. *Bullard,* 303 U.S. 297. It is submitted that the differentiation of treatment of shareholders in the two different classes of banks here considered, whether by Massachusetts in its tax law or by the federal government in the Federal Revenue Act, is not offensive to the provisions of the federal constitution.

It is further submitted that the four cases cited by the Massachusetts court in support of its conclusion that the taxing statute was discriminatory are not in point, for the following reasons:

Miller v. *Milwaukee,* 272 U.S. 713, held that where income from bonds of the United States, which by Act of Congress is exempt from state taxation, is reached purposely in the case of corporation-owned bonds, by exempting the income therefrom in the hands of the corporation, and taxing only so much of the stockholder's dividends as corresponds to the corporate income not assessed, the tax is invalid. The court, at page 715, said: "A result intelligently foreseen and offering the most obvious motive for an act that will bring it about, fairly may be taken to have been a purpose of the act. On that assumption the immunity of the national bonds is too important to allow any narrowing beyond what the Acts of Congress permit." The decision clearly rested on the ground of immunity, not violation of the due process or equal protection clauses.

Macallen Co. v. *Massachusetts,* 279 U.S. 620, likewise involved only the immunity doctrine in a case where the court concluded that the state legislature had added to the income used to measure a corporate excise interest from federal obligations with the "sinister" motive of reaching that income. See, however, *Pacific Co.* v. *Johnson,* 285 U.S. 480.

Frost v. *Corporation Commission,* 278 U.S. 515, dealt with a statute of Oklahoma regulating the business of ginning cotton for the general public for profit, forbidding the

operation of a gin without a permit and requiring for the procurement of the permit a satisfactory showing of public necessity. The statute contained a proviso for permitting a cooperative organization to acquire such a permit without showing public necessity. The court held the statute discriminatory by reason of this proviso, and pointed out, at page 523, that "By the terms of the statute here under consideration, appellant, an individual, is forbidden to engage in business unless he can first show a public necessity in the locality for it; while corporations organized under the act of 1919, however numerous, may engage in the same business in the same locality no matter how extensively the public necessity may be exceeded." This court found that the proviso produced an arbitrary classification because based on no real or substantial differences *having reasonable relation to the subject dealt with by the legislation.* Obviously there might exist and are circumstances under which it is reasonable to differentiate between individuals and corporations, but for purposes of determining whether there is need of a ginning business in a particular locality it is immaterial whether that business is to be operated by an individual or by a corporation. The case throws no light upon the issue here involved as to whether the Massachusetts statute is arbitrary in exempting from taxation the receipt of dividends from shares of one type of banking organization and not exempting the receipt of dividends from the shares of another type.

The last of the four cases cited by the Massachusetts court in support of its conclusion is *Iowa-Des Moines National Bank* v. *Bennett,* 284 U.S. 239. This decision involved two cases—one in which a national bank was taxed upon its shares at a rate higher than in fact was exacted by the state authorities upon other moneyed capital and one in which a state bank was so taxed. There was no question raised as to the validity of the taxing statute as this statute

applied not only to shares of national and state banks but to other moneyed capital in conformity with the provisions of section 5219 of the Revised Statutes of the United States. With respect to the national bank this court states that the limitations of the permission granted by said section 5219 were exceeded when the State Treasurer exacted from the bank a tax at rates greater than those applied in exacting payment from competing domestic corporations. It held that the state was responsible for the propriety of the determination of its subordinate officers as to what constituted moneyed capital and that "The discrimination was none the less action by the State although the auditor and the treasurer, in failing to give equal treatment, acted without authority and contrary to the law of the State" (page 244). It does not clearly appear whether the portion of the decision relating to the national bank rested solely on the immunity doctrine or solely on the doctrine of discrimination, or on both. It would appear, however, that in so far as the decision relates to the state bank it rests solely upon the equal protection clause of the Fourteenth Amendment. The court "assumed" (page 245) that there was such inequality of treatment as the constitution prohibits and held that, the exaction being made by the state official in the name of and for the state, in the course of performing his regular duties, the money being retained by the state, and the judicial power of the state having been exerted in justifying the retention, the state is responsible for the discrimination even though the state statute did not impose the alleged discriminatory tax. This case again falls far short of providing a precedent governing the instant case. It did not involve the constitutionality of any taxing statute. The discriminatory character of the levy was assumed, not decided. The tax was imposed upon the bank, not upon the receipt of income by its resident

shareholders. The congressional authority to tax under section 5219 was admittedly exceeded.

Although the court below concluded that there was no violation of the right of a federal instrumentality to immunity from state taxation and rested its decision solely upon the ground that the tax statute was discriminatory, the contention of immunity was presented by the taxpayer. It is submitted that the Massachusetts court rightly considered that the tax violated no principle of immunity, since it was laid only upon the shareholder, not upon the bank. *Clement National Bank* v. *Vermont*, 231 U.S. 120; *Colorado National Bank of Denver* v. *Bedford*, 1939 Term, United States Supreme Court, Law. Ed. Advance Opinions, page 730 (decided April 22, 1940). Indeed, in the instant case the bank was not even required to collect and remit the tax. The ruling of the Massachusetts Supreme Court that the tax is upon the shareholder and not upon the bank is conclusive upon this court. *Clement National Bank* v. *Vermont, supra.*

In the case of *Colorado National Bank of Denver* v. *Bedford, supra,* this court assumed among other stated propositions "that Congress may intervene to protect its instrumentalities from any other tax which threatens their usefulness." Not only is the tax in the instant case not a threat to such an instrumentality, being in that respect analogous to the tax in the Colorado National Bank case, but it is also true that in the instant case Congress has made no attempt to intervene to prevent the type of tax imposed by Massachusetts on the receipt of income by stockholders in federal savings and loan associations who are inhabitants of Massachusetts. U.S.C. Title 12, section 1464 (h), provides that "no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local

mutual or cooperative thrift and home financing institutions." Certainly there is no inhibition in this provision against the Massachusetts tax here involved if indeed the specific enumeration of forbidden taxes does not carry the implication that what Congress did not forbid it intended to permit. Moreover, it is not understood that the fundamental doctrine of dual sovereignty has ever been repudiated by this court. There is at least factually a vast distinction between according protection to government finance and essential governmental activities and extending a favored position to private capital invested in an agency established primarily not to aid in financing the needs of the sovereign body but to promote the welfare of a certain group of the citizenry. To permit the federal government to exclude the state governments from deriving their necessary tax revenue from the returns upon private capital invested in enterprises incorporated by virtue of federal authority will tend to defeat rather than to serve those fundamental principles of dual sovereignty which forbid each to cripple the financial resources of the other.

With the wide extension of federal enterprises affording an opportunity for investment of private capital, the revenue resources of the states, both in respect to capital and in respect to income tax levies, would be most seriously impaired if this entire field is made immune from state taxation. The result would be to impede the resources of the states, extend the field of tax exempts, enlarge existing inequalities and inequities in taxation, all without materially assisting the federal government to finance its own burdens, save as driving the states out of this field of taxation may afford the federal government an opportunity to impose more drastic rates in that field. It is not believed that such a one-sided doctrine of immunity was within the contemplation of those who adopted the federal constitution or its amendments, nor within the spirit of its provisions as interpreted in the light of present day conditions.

Conclusion.

It is believed that the case at bar is controlled by, and the decision of the Supreme Judicial Court of Massachusetts is opposed to, the decisions of this court relied upon in the foregoing brief as therein set forth. If not, the issues involved present substantial federal questions which have never been determined by this court and the decision of this court would be of great help and importance not only to the Commonwealth of Massachusetts but to other states having income tax laws. For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

PAUL A. DEVER,
Attorney General.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 630

COMMISSIONER OF CORPORATIONS AND TAXATION,
PETITIONER

v.

EDWARD H. FLAHERTY,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR THE RESPONDENT IN OPPOSITION

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PRESS OF GEO. H. DEAN CO., BOSTON

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OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts (R. 37-42) is reported in Massachusetts Adv. Sh. (1940) p. 1229 and may also be found in 28 N. E. (2d) 433. The opinion of the Appellate Tax Board of Massachusetts (R. 25-29) is reported in Massachusetts A.T.B. (1940) p. 5.

JURISDICTION

The final judgment or order of the Supreme Judicial Court was entered September 16, 1940 (R. 44.) The petition for a writ of certiorari was filed December 13, 1940. The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Commonwealth of Massachusetts has power under the Constitution of the United States to lay an income tax on dividends received by residents of Massachusetts on shares in Federal Savings and Loan Associations while exempting dividends on shares in Massachusetts cooperative banks, which are in direct competition with Federal Savings and Loan Associations, from the same or any equivalent tax burden.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 13-19.

STATEMENT

This proceeding was brought by respondent in the Massachusetts Appellate Tax Board to secure abatement of an income tax assessed by petitioner with respect to dividends received by respondent in 1937 on shares owned by him in the Worcester Cooperative Federal Savings and Loan Association. The findings of fact made by the Appellate Tax Board (R.

20-25) which are final (Mass. G. L., c. 58A, sec. 13), may be summarized as follows:

The Worcester Cooperative Federal Savings and Loan Association is a Federal Savings and Loan Association chartered under Section 5 of the Home Owners' Loan Act of 1933 (*infra*, p. 13). It was formed by the consolidation of three Federal Savings and Loan Associations all of which were formerly cooperative banks incorporated under the laws of Massachusetts, and the subsequent merger of another cooperative bank. (R. 21.) It is engaged in the business of making loans on the security of first liens upon homes, or combinations of homes and business property, to a limited extent on the security of first liens upon other improved real estate, and on the security of its share accounts. (R. 21.) Its capital is derived from payments made on share accounts by individuals, partnerships, associations and corporations for savings and investment purposes. (R. 21.)

Pursuant to Section 5(k) of the Home Owners' Loan Act of 1933 (*infra*, p. 17) the Worcester Cooperative Federal Savings and Loan Association has been designated by the Secretary of the Treasury a fiscal agent of the federal government for the purpose of collecting delinquent accounts arising out of insurance and loan transactions under Title I of the National Housing Act of June 27, 1934, as amended, and also for making investigations and rendering reports respecting such delinquencies as and when directed by the Administrator under said Act, and also for the purpose of taking applications from its members and forwarding remittances for and making de-

livery of United States Savings Bonds. (R. 21.) The association is a member of the Federal Home Loan Bank of Boston. (R. 21.)

The business of Federal Savings and Loan Associations is similar to that of institutions commonly known as building and loan associations or savings and loan associations, and better known in Massachusetts as cooperative banks. (R. 21-22.) The principal purposes of these institutions are the promotion of thrift and home financing by providing a convenient means for the saving and investment of money and a sound and economical method of so doing. (R. 22.) The Worcester Cooperative Federal Savings and Loan Association is in direct competition with cooperative banks organized under the laws of Massachusetts, especially the cooperative banks doing business in Worcester County. (R. 24.) They appeal to the same type of investor and the same type of borrower. The character of investments and the character of loans which they offer are substantially identical. (Requests for Findings of Fact, par. 48, R. 17, granted R. 29; see also R. 37-8.)

As of December 31, 1937 there were 26 Federal Savings and Loan Associations doing business in Massachusetts, with a total of 65,261 shareholders. In 1937 there were 189 cooperative banks doing business in Massachusetts, of which 14 had their headquarters in Worcester County. (R. 22-24.) The Appellate Tax Board made detailed statistical findings tending to show the similarity between the business of Federal Savings and Loan Associations and that of Massachusetts cooperative banks. (R. 22-24.) Substantially the same information will be found in the record in a table marked "Exhibit 14".

Under the laws of Massachusetts the capital stock, corporate franchises and personal property of cooperative banks are exempt from all state and local taxes. (R. 24, 26; see also excerpts from statutes in Appendix, *infra,* p. 18.) The Massachusetts personal income tax law specifically exempts dividends on cooperative bank shares from taxation as income to the shareholders (R. 24, 26; Appendix, *infra,* pp. 18-19), but, as the court below stated, its language is broad enough to include dividends on shares in Federal Savings and Loan Associations in the category of taxable income. (R. 41.) Cooperative banks pay no taxes under Massachusetts law except local taxes on the real estate which they own. Such real estate taxes are also paid by Federal Savings and Loan Associations. (R. 16, 24, 29.)

The Appellate Tax Board rendered a decision in favor of the taxpayer, respondent here, and ordered abatement of the tax. (R. 29.) Petitioner appealed to the Supreme Judicial Court, which in effect affirmed the decision of the Board by ordering that the tax be abated. (R. 35, 42, 44.)

ARGUMENT

I.

We submit that the decision below is clearly correct and consistent with principles repeatedly enunciated by this Court, and that accordingly there is no necessity for the granting of the petition.

The validity of the Massachusetts income tax as applied to dividends on shares in Federal Savings and Loan Associations was challenged by respondent on two grounds: first, that since no equivalent tax is

laid on dividends paid by Massachusetts cooperative banks the law discriminates against the federal associations and thus violates the immunity conferred by the Constitution upon agencies and instrumentalities of the federal government; second, that there is no rational basis for the difference in tax treatment accorded to shareholders of the two groups of institutions, and therefore the law contravenes the equal protection clause of the Fourteenth Amendment.

The Appellate Tax Board based its decision on the first ground alone. (R. 28.) Petitioner interprets the opinion of the Supreme Judicial Court as holding that the Massachusetts law does not infringe upon the implied immunity of federal instrumentalities, and suggests that the decision below rests wholly upon the Fourteenth Amendment. (Pet., p. 8; Brief, p. 16.) This interpretation of the opinion, which we submit is erroneous, results from petitioner's failure to observe the distinction between absolute immunity and immunity from discriminatory taxation. Respondent did not urge (R. 40) that dividends on shares in Federal Savings and Loan Associations were wholly immune from taxation by the states, since it was considered that recent decisions of this Court precluded any such contention. The contention advanced by respondent was that such dividends were immune from discriminatory taxation because a discriminatory tax, unlike a tax laid upon income derived from private and governmental sources alike, imposes a substantial burden upon the exercise of the powers of the national government. This distinction was clearly recognized by the court below. We submit that the opinion sustains respondent's contention.

Recent decisions of this Court dealing with the question of governmental immunity have not questioned the basic principle that one government, federal or state, may not interfere with or substantially impede the operations of the other within its proper sphere of action. Reappraisal of the practical effects of taxation on the source of the property or income taxed, together with an increasing recognition of the desirability of limiting the field of exemptions, have led to the conclusion that non-discriminatory taxation of income from governmental sources is not in fact prejudicial to the government and that the resulting burden, if any, should be regarded as "but the normal incident of the organization within the same territory of two governments, each possessing the taxing power". *Graves* v. *O'Keefe*, 306 U. S. 466, 487. In so holding, however, this Court has consistently emphasized the non-discriminatory character of the tax under consideration. See *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 524; *Willcuts* v. *Bunn*, 282 U. S. 216, 225, 226, 227, 229; *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279, 282; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149; *Helvering* v. *Gerhardt*, 304 U. S. 405, 413, 420; *Graves* v. *O'Keefe*, *supra*. It seems clear that the considerations on the basis of which the Court sustained the taxes involved in the above cases would not have warranted approval of taxes discriminating against the government agencies concerned. Taxation which falls more heavily on income derived from the government or its instrumentalities than on income from private sources is not a "normal incident" of our system of dual sovereignty. The burden of such a tax is not remote and innocuous, but direct and prejudicial. See *Pa-*

cific Co., Ltd. v. *Johnson,* 285 U. S. 480, 493; *Schuylkill Trust Co.* v. *Pennsylvania,* 296 U. S. 113; *Miller* v. *Milwaukee,* 272 U. S. 713. See also *Darnell & Son Co.* v. *Memphis,* 208 U. S. 113; *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33, 48-9; *Best & Co., Inc.* v. *Maxwell,* Oct. Term, 1940, No. 61 (decided December 23, 1940).

Petitioner seeks to justify the taxation of dividends paid by Federal Savings and Loan Associations by pointing to alleged differences between such associations and Massachusetts cooperative banks. (Brief, pp. 11-12.) But we submit that the criteria to be applied in determining whether taxes violate the equal protection clause are not appropriate to a determination of the question whether they infringe upon the immunity of government instrumentalities from discriminatory taxation. A tax which discriminates against an agency of the federal government cannot be justified on the basis of the power of the states to select and classify subjects for taxation, otherwise the principle of non-interference would be nullified.

That the application of the Massachusetts income tax to income derived from the federal associations constitutes discrimination of the type impliedly prohibited by the Constitution admits of little doubt. Petitioner does not question the status of the associations as federal instrumentalities, created by Congress in the valid exercise of its constitutional powers.[1] Since cooperative banks and their shareholders

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[1]See *Kay* v. *United States,* 303 U. S. 1; *Graves* v. *O'Keefe,* supra; *Pittman* v. *Home Owners' Loan Corp.,* 308 U. S. 21; *First Federal Savings & Loan Association* v. *Loomis,* 97 F. (2d) 831 (C.C.A. 7th), petition for certiorari dimissed *sub nom. Martin* v. *First Federal Savings and Loan Association,* 305 U. S. 666.

are exempt from all state and local taxes other than real estate taxes, which the federal associations also pay, it is clear beyond dispute that the shareholder in a cooperative bank bears no burden of state taxation, direct or indirect, equivalent to the burden of the tax sought to be imposed on dividends paid by the federal associations. We submit that this constitutes improper discrimination against federal instrumentalities, notwithstanding the fact that the tax is on the individual rather than on the association itself. A close analogy is found in cases arising under Section 5219 of the Revised Statutes (U.S.C., Title 12, Sec. 548), which forbids discriminatory taxation of national bank shares or dividends thereon. The purpose of that prohibition was to render it impossible for the states to "create and foster an unequal and unfair competition with national banks, by favoring shareholders in state banks * * * ". *First National Bank* v. *Anderson,* 269 U. S. 341, 347-8. In *Mercantile Bank* v. *New York,* 121 U. S. 138, this Court said (p. 155):

> "A tax upon the money of individuals, invested in the form of shares of stock in national banks, would diminish their value as an investment and drive the capital so invested from this employment, if at the same time similar investments and similar employments under the authority of state laws were exempt from an equal burden."

True, the statute governing the creation and operation of Federal Savings and Loan Associations neither sanctions nor prohibits taxation of their dividends by the states. (Section 5(h), *infra,* p. 16). But it seems self-evident that a discriminatory tax on such dividends, no less than a tax on the shares them-

selves, would diminish the value of the shares as an investment and tend to drive away the capital so invested; and although the silence of Congress may be taken as consent to taxation of such dividends on the same basis as dividends paid by competing institutions organized under state law, we submit that the silence of Congress cannot be deemed to constitute consent to taxation of dividends paid by the federal associations when those paid by cooperative banks are exempt from an equivalent burden. See *Clement National Bank* v. *Vermont,* 231 U. S. 120, 135. Cf. *Colorado National Bank of Denver* v. *Bedford,* 310 U. S. 41; *Graves* v. *O'Keefe, supra,* at p. 480.

It is of no significance that the exemption of dividends on shares in cooperative banks from taxation by the Commonwealth antedates the creation of Federal Savings and Loan Associations. The absence of a hostile motive or a deliberate purpose to discriminate against the federal agencies is entirely immaterial if the tax burden in fact falls more heavily on them than on their competitors. *First National Bank* v. *Hartford,* 273 U. S. 548, 560.

II.

While we do not consider it necessary to rely on the Fourteenth Amendment to support the decision below, we submit that the Supreme Judicial Court was right in stating that there was no "rational difference, having a fair and substantial relation to the object of the taxing statute" between dividends on shares in Federal Savings and Loan Associations and dividends on cooperative bank shares. (R. 41-2.)

The only significant difference is that the federal associations are chartered under act of Congress and are not subject to control or supervision by state authorities, whereas the cooperative banks are chartered under state law and are subject to the supervision of the state banking commissioner.[2] None of the familiar bases of classification which have been deemed adequate to justify differences in tax treatment are discernible here. Cf. *Welch* v. *Henry,* 305 U. S. 134; *Madden* v. *Kentucky,* 309 U. S. 83; *Magnano Co.* v. *Hamilton,* 292 U. S. 40. The mere fact that the associations are organized under federal rather than state law seems clearly insufficient to warrant the difference in treatment, since classification on that basis alone would run directly counter to the immunity doctrine hereinabove discussed.

[2]Petitioner suggests that there is a further difference in that the federal associations are members of the Federal Home Loan Bank of Boston and have been designated as fiscal agents of the United States Government for certain purposes. (Brief, pp. 11-12.) It is to be observed, however, that under Section 4 of the Federal Home Loan Bank Act of 1932, c. 522, 47 Stat. 725, as amended (U.S.C., Title 12, sec. 1424) any cooperative bank may, if it meets certain requirements, become a member of a Federal Home Loan Bank, and that under Section 5 (k) of the Home Owners' Loan Act of 1933, c. 64, 48 Stat. 128, as amended (U.S.C., Title 12, sec. 1464 (k)), any member of a Federal Home Loan Bank may be designated and employed as fiscal agent of the government or as agent of any instrumentality of the United States. In 1939 there were 184 cooperative banks in Massachusetts, of which 97 were members of the Federal Home Loan Bank System and thus eligible for designation as such agents. See Annual Report of Massachusetts Commissioner of Banks for the year ending October 31, 1939; *Membership of the Federal Home Loan Bank System, December 31, 1939,* published by the Federal Home Loan Bank Board, Washington, D. C.

CONCLUSION

We submit that the decision below is plainly correct and that the principles on which it rests have been so firmly established by this Court that no substantial federal question is presented. The petition should therefore be denied.

Respectfully submitted,

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January, 1941.